O/C 1-27-87

IN THE
SUPREME COURT OF THE STATE OF FLORIDA

FILED

ROBERT E. ELLIOTT and LINDA J. ELLIOTT,

Petitoners,

vs. CASE NO. 68,911

RICHARD E. KRAUSE and MARGARET MACKIN,

Respondents.

_____/

ON PETITION FOR DISCRETIONARY REVIEW OF CONFLICT
FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

INITIAL BRIEF OF PETITIONERS ON THE MERITS

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ISSUE

WHETHER A SUBSEQUENT LIMITATION IN A WILL ON AN EARLIER FEE SIMPLE DEVISE OF REAL PROPERTY CONTROLS THE DISTRIBUTION OF THE PROPERTY UNDER THE WILL.

STATEMENT OF THE FACTS AND CASE

This case is a will contest in which the principal asset of the estate is a piece of real property which Ernest and Marie Krause originally owned as tenants by the entireties.

Marie and Ernest Krause executed a joint will in January, 1955. A copy of the will is attached as an appendix to this brief.

The will had seven testamentary provisions. The first provided:

> A. Real Estate
>
> We bequeath, grant, give, transfer and convey to the survivor of the other herein all the real estate and appurtenance located thereon, regardless of whatsoever kind or nature, regardless of wheresoever same is situated or located and regardless of the amount or value in fee simple that the deceased party herein has at the time of his or her death, to do with and handle as the survivor cares to do, including the selling of any portion or all of said real estate so left if such is desired by the survivor and beneficiary.

The last testamentary provision was paragraph 5 and provided:

> 5. At the death of the survivor of the undersigned whatever property, real, personal, tangible or intangible owned by either of them, said property is hereby bequeathed, granted, conveyed, set over, and transferred to Robert Elliott and Richard Krause, each to share equally in said properties; each receiving a one-half interest in same ....

Robert Elliott is Marie's nephew and Richard Krause is Ernest's son.

In 1970 Marie and Ernest executed and recorded an agreement [R.4] which converted the ownership of the property to a tenancy in common and provided:

> It is further the intent of the parties hereto, that should [Marie] predecease [Ernest], that [Ernest] shall have the right to use and occupy the above property during the term of his natural life, and that upon the death of [Ernest], [Marie's] ½ interest in said property shall descend and be distributed to [Marie's] heirs at law, or in accordance with her last Will and Testament.

The parties stipulated [R.40] into evidence two letters from Marie to Robert Elliott in which Marie told him he was to receive one-half the property after Marie and Ernest died. [R.42, 45]

In 1977, Marie died and later that year, Ernest executed a new will specifically disinheriting the Elliotts and leaving all his property to Richard Krause and Margaret Mackin. [R.20] Ernest died in 1982 while in possession of the property [R.2], and the Elliotts objected to the distribution of the real property under Ernest's new will [R.26].

The trial court entered a Final Order [R.81] that the joint will was revocable by Ernest and ruling that Marie's property passed to Ernest under Paragraph A in fee simple Ernest and not under Paragraph 5, and was therefore to be distributed in accordance with Ernest's new will, one-half to Richard E. Krause and one-half to Margaret Mackin.

The Elliotts appealed and the Fifth District affirmed, Judge Sharp dissenting in part. Elliott v. Krause, 490

So.2d 956 (Fla. 5th DCA 1986). On the first issue the Fifth District agreed with the trial court that the evidence did not support an agreement not to revoke the joint will. 490 So.2d at 957.

The second issue was whether the 1955 will, which was Marie's last will, conveyed her one-half interest in the property to Ernest in fee simple under Paragraph A, or whether the conveyance was limited by the later language of Paragraph 5 transferring one-half interest to Robert Elliott and to Richard Krause in whatever property was owned at the death of the survivor of Marie and Ernest. In reconciling the differences between Paragraph A and Paragraph 5, the Fifth District held:

> We conclude that the inclusion of the word, "real" in the paragraph labelled "Personal Property" was simply a scrivener's error. 490 So.2d at 957.

On September 16, 1986, this Court accepted jurisdiction of this case on the petition for discretionary review of conflict between the decision of the Fifth District and prior decisions of this Court and other district courts, pursuant to Article V, sec.3(b)(3), Fla. Const.

SUMMARY OF ARGUMENT

Prior decisions of this Court and the district courts of appeal have firmly established the rule that later provisions of a will devising a remainder interest in real property limit earlier provisions devising fee simple title and are to be enforced.

In this case, the Fifth District ignored the devise of the remainder by editing the devise out of the will, frustrating the testatrix's intent expressed not only in the will, but in the other documents in evidence.

Because the decision below reaches a result contrary to the established law and frustrates testamentary intent, the decision ought to be reversed.

ARGUMENT

A SUBSEQUENT LIMITATION IN A WILL ON A DEVISE OF REAL PROPERTY GOVERNS THE DISTRIBUTION OF THE PROPERTY BECAUSE IT IS THE LAST EXPRESSION OF THE TESTATRIX'S INTENT.

The Fifth District's decision to ignore the language of the testatrix in a subsequent clause limiting the interest devised in real property to a life estate conflicts with this Court's decisions in Roberts v. Mosely, 100 Fla. 267, 129 So. 835 (1930) and Sanderson v. Sanderson, 70 So.2d 364 (Fla. 1954), and with the decision in Dutcher v. Estate of Dutcher, 437 So.2d 788 (Fla. 2d DCA 1983).

This Court has dealt before with the very same problem presented here. In Roberts v. Mosely, 100 Fla. 267, 129 So. 835 (1930) the will provided first that the wife was to "receive in fee simple, all of my property, real, personal, and mixed." 129 So. at 836. Subsequently, the will provided that if the wife owned any of the property at her death:

> upon her said death, my sister... shall have and receive in fee simple, one-half of my said property ... and that my said wife's half-sisters ... shall each have and receive in fee simple, one-fourth .... Id.

The wife's new husband argued that she received the entire estate in fee simple under the first paragraph and that the second paragraph giving one-half to the testator's sister was void for repugnancy.

Ruling against that argument, this Court held:

> We think the better rule to be that the devise of an estate in fee simple may be limited by a subsequent valid provision that the estate shall go over to others

> upon the happening of a named contingency or that it may be restricted by subsequent provisions in the will so that in effect it becomes an estate for life as to the remainder. 129 So. at 837.

Once again, in Sanderson v. Sanderson, 70 So.2d 364 (Fla. 1954), this Court had before it a joint and mutual will of a husband and wife which provided:

> [T]he entire estate of the one passing away first shall belong in its entirety to the one still living to use and enjoy as they wish to do .... Any residue of the estate left after both husband and wife have passed away ... shall be divided equally between [the sons]. Id. at 365.

In that case, this Court said:

> [I]t is clear that this provision must be construed, under Roberts v. Mosely, supra, as restricting the otherwise broadly stated devise to the widow so that in effect it becomes an estate for life as to the remainder. Id. at 366-367.

The decision of the Fifth District in this case refusing to give effect to the limitations of Paragraph 5 restricting the devise in Paragraph A directly conflicts with Roberts and Sanderson.

In this case, just as in Sanderson and Roberts the contingency limiting the devise of the fee was that if the survivor possessed the property at death, it would be divided among other heirs. The contingency was fulfilled, Ernest Krause still owned the real property at his death, and Marie's half interest should have been split according to her will.

The structure and language of the will itself, while not a model, plainly expresses Marie's intent. It is divided into three parts: the first names the executor; the second disposes of the property, and the third gives instructions for Marie's funeral.

Within the second part, there are seven testamentary provisions. Paragraph A is a general devise of all real property. Paragraph B is a general bequest of all personal property. Paragraphs 1 through 4 are specific bequests, limiting the general bequest of Paragraph B. Finally, Paragraph 5 is the residuary clause providing for the division of whatever property remains between the two families upon the death of the survivor.

Plainly, it was Marie's intent that all of her property, with the exception of the specific bequests, was to go to Ernest for him to use and even sell during his lifetime, but upon his death her family was to receive half of whatever was left.

The Fifth District acknowledged this testamentary intent in its opinion, saying the will:

> provided that, after certain specific bequests, the surviving spouse would receive the property of the deceased spouse but upon the death of the survivor, the estate would be divided equally between Marie's nephew ... and Ernest's son .... 490 So.2d at 956.

The Fifth District also recognized that Marie expressed her intent that her interest was to go to Robert Elliott in the

1970 agreement and in letters to Mr. Elliott. 490 So.2d at 957.

Yet, the Fifth District refused to give effect to this acknowledged intent. The court arrived at its conclusion not by construing the language of the will, but by editing the word "real" out of the residuary clause.

In construing the effect of Paragraph 5 on the earlier devise "in fee simple" to Ernest, the Fifth District struck the word "real" from the paragraph providing:

> At the death of the survivor of the undersigned whatever property, real, personal, tangible or intangible owned by either of them said property is hereby bequeathed ... to Robert Elliott and Richard Krause ....

The majority edited the will, describing the term "real" as a "scrivener's error," because the heading of a preceding paragraph read "Personal Property," and the Fifth District considered Paragraph 5 to be part of the earlier paragraph 490 So.2d at 957. Paragraph 5, however, is the only paragraph disposing of the estate upon the survivor's death and is not part of Paragraph "B. Personal Property" either testamentarily or grammatically.[1]

No rule of will construction permits a heading to govern over testamentary provisions, or words to be edited

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[1] The exposition of Paragraph 5 in the opinion of the Fifth District is inaccurate. The opinion has Paragraph 5 indented under Paragraph B. In the will, however, Paragraph 5 returns to the margin, as do all the provisions of the will. Grammatically, it is not set up as a subparagraph.

out to avoid conflict between testamentary provisions. See, Hulsh v. Hulsh, 431 So.2d 658, 665 (Fla. 3d DCA 1983).

The decision of the Fifth District ignoring the later limitation on the fee simple devise directly conflicts with the rule of construction most recently reiterated in Dutcher v. Estate of Dutcher, 437 So.2d 788, 790 (Fla. 2d DCA 1983):

> If there is an irreconcilable conflict between two provisions in a will, the latter provision will usually prevail as being the last expression of the intention of the testatrix where the provisions refer to the same subject matter.

That the intent of the testator governs will construction is such a venerable rule that in Smith v. Bell, 6 Peters 68, 75, 8 L.Ed. 322, 325 (1832), Chief Justice Marshall was able to say:

> The first and great rule in the exposition of wills (to which all other rules must bend) is that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law.

Indeed, it was upon the authority of Smith v. Bell that this Court decided Roberts. 129 So. at 837.

The rule that a subsequent grant of a remainder following a grant of a fee is effective and limits the fee has as its sole purpose effectuating the desires of the testatrix to provide for her husband during his life, and for her family upon his death. Under this rule, the provisions of Marie's will were neither in irreconcilable conflict nor in need of judicial rewriting.

The decision of the Fifth District is contrary to the well-established principles of will construction enunciated in Roberts, Sanderson, and Dutcher. The Fifth District's departure from these principles in this case has resulted in the very evil the principles are designed to prevent -- frustration of the testatrix's intent. Under this decision, Marie's family gets nothing from her share of the property in spite of her desire that Robert Elliott get one-half of her interest upon her husband's death. Such a result is directly contrary to this Court's pronouncement in Roberts, 129 So. at 836:

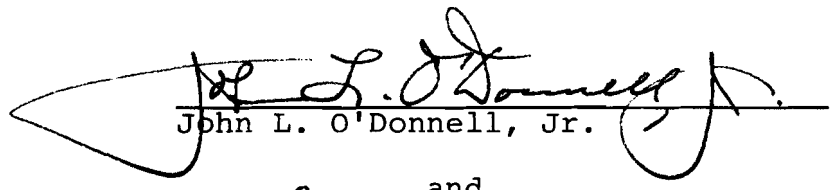
> The canons of testamentary construction are few and unambiguous; the cardinal one being that, in the interpretation of a will, the intention of the testator must be given effect, provided it be not inconsistent with the rules of law. The intent of the testator should be determined by a consideration of the whole instrument. If there are expressions in the will difficult to reconcile, the posture of the testator, the ties that bind him to the legatee, the motives that prompted him to make the will he did make, and the influences that wrought on him, may be considered in arriving at the purpose of the testator.

The decision of the Fifth District in this case conflicts with these principles and ought to be reversed.

CONCLUSION

Because the decision of the Fifth District refusing to give effect to the provisions of a later clause limiting the estate devised in an earlier clause is contrary to prior decisions of this Court and other district courts and frustrates testamentary intent, the decision ought to be reversed and the case remanded under instructions for the Fifth District to reverse the order of the circuit court and instruct the circuit court to order distribution of the remainder interest in Marie Krause's half interest in the real property one-half to Robert Elliott and one-half to Richard Krause.

Respectfully submitted,



John L. O'Donnell, Jr.

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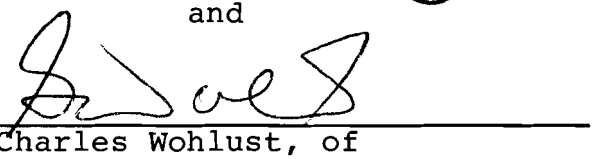

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the brief and appendix has been furnished by mail to C. John Coniglio, Esq., Post Office Box 1119, Wildwood, Florida 32785, this 10th day of October, 1986.

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